

[\*Hancock v. Nuclear Assurance Corp.\*](#), 91-ERA-33 (ALJ Jan. 7, 1992)

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DATE: JAN 7 1992

CASE NO.: 91-ERA-33

IN THE MATTER OF

ANGELA G. HANCOCK,  
COMPLAINANT,

v.

NUCLEAR ASSURANCE CORPORATION,  
RESPONDENT.

**RECOMMENDED DECISION AND ORDER**

This proceeding arises from a claim filed with the Wage and Hour Division of the United States Department of Labor pursuant to § 210 of the Energy Reorganization Act (ERA) of 1974, 42 U.S.C. § 5851.

**Procedural History**

On March 4, 1991, the Complainant filed a "whistleblower" complaint claiming that she had been discharged from employment with the Respondent on January 17, 1991, in retaliation for

On April 1, 1991, a United States Department of Labor District Director notified the Complainant that her complaint was filed more than 30 days after the occurrence of the allegedly discriminatory act by the respondent, and was thus time-barred under the implementing regulations of § 210 of the Energy Reorganization Act (JX 2).

The Complainant thereafter sought review of the District Director's ruling before Administrative Law Judge Daniel A. Sarno, Jr., which was granted on April 24, 1991. The case was bifurcated at the request of the parties. On June 13, 1991, a hearing on the complaint's timeliness was held in Atlanta, Georgia. On August 30, 1991, the undersigned entered an Order overruling the decision of the District Director and tolling the thirty-day limitations period. (See *Preliminary Timeliness Ruling* dated August 30, 1991).

A hearing was held on the substantive merits of the case on October 1, 1991 in Atlanta, Georgia. At the conclusion of the hearing, a briefing schedule was established with briefs to be due on or before December 13, 1991.

#### Issue

Whether the Respondent violated 42 U.S.C. § 5851 in terminating the Complainant's employment on January 17, 1991.

#### Stipulations

The parties stipulated to the following<sup>2</sup> :

1. The Respondent was subject to the Energy Reorganization Act of 1974 at all times material to this action.
2. The Complainant's employment with the Respondent commenced on September 5, 1990 and was terminated on January 17, 1991.
3. The Complainant's letter to the United States Department of Labor which constitutes her complaint in this action was dated March 4, 1991.

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### FINDINGS OF FACT

#### Overview

The Complainant was employed by the Respondent as a technical aide, coding and inputting nuclear fuel data into mainframe computers from September 5, 1990 until January 17, 1991. (TR. 8, June 13, 1991 hearing; TR. 13<sup>3</sup>). On January 11, 1991, the Complainant reported to the FBI what she considered to be suspicious behavior on the part of co-employee, Ms. Varsha Shah<sup>4 5</sup> (Tr. 9, June 13, 1991 hearing). FBI Special Agent Gerard P. Waring received the Complainant's phone call<sup>6</sup>. (TR 68). On January

17, 1991, the Complainant was called into her supervisor's office and terminated. (TR. 9, 10, June 13, 1991 hearing). The reasons given for her termination in the memo-to-the-file were: (1) unacceptable quality in computer coding, editing and filing; (2) inability to follow directions; (3) inability to accept responsibility for her errors and (4) that the Complainant had expressed displeasure in her job. (RX 4). In addition, the separation notice stated that the Complainant "was terminated for poor performance". (RX 5).

The Complainant asserts that the involuntary termination from her employment with the Respondent was in retaliation for her telephone call to the FBI in which she reported the suspicious activity of a co-employee. She further professes that the reasons given for her termination both orally and by memo to her personnel file are pretextual. The Complainant submits that this is protected activity under Section 210 of the Energy Reorganization Act and that the Complainant is thus entitled to reinstatement to her position, back pay or in the alternative, reinstatement front pay for a period of at least one year, plus back pay. In addition, the Complainant asks for reasonable expenses and attorneys fees.

The Respondent contends that the Respondent knew nothing of the FBI report at the time that it terminated the Complainant. Furthermore, the Respondent submits that the reasons for the Complainant's termination are performance based.

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#### Complainant's Testimony

1. The Complainant testified that she began working for the Respondent on September 5, 1989 and was terminated on January 17, 1990. The Complainant responded to an advertisement in the paper, and following an interview with Mr. Rob Rogers, was given the position. Her duties included the coding and inputting of nuclear fuel data into mainframe computers and microfiche copying and filing. (TR 11-12).
2. The Complainant testified that she had never been fired from a job before her employment with the Respondent. (TR 12). 3. Ms. Vickie S. White completed a performance appraisal on and discussed the results with the Complainant on November 15, 1990. (CX 1; TR 13).
4. Based on a 5-rating scale, the Complainant was rated as either good or very good in each of the 12 categories with the exception of "Quality" wherein it was noted that the Complainant "needs to check her work more closely. This will most likely improve with experience." (CX 1).
5. The Complainant testified that she took steps to improve her job performance. (TR 15).
6. The Complainant further stated that she never received comments critical of her work from her supervisors, nor was any of her work returned to her to be redone. (TR 16).

7. On January 11, 1991, the Complainant telephoned the FBI to report suspicious behavior on the part of her co-worker, Ms. Varsha Shah. (TR 9, June 13, 1991 hearing). The Complainant began the conversation by discussing some of the activity she had observed Ms. Shah engaging in and the type of work done in her employment. (TR 17). The Complainant told the FBI agent about telephone calls that Ms. Shah conducted in a foreign language when she believed she was alone. The Complainant felt that this behavior was suspicious due to her belief that Ms. Shah was a foreign national, heated political discussions that the Complainant and Ms. Shah had engaged in over the current world situation and the nature of the work performed by the Respondent. (TR 53-58).

8. The next time the Complainant called the FBI was on January 17, 1991. The Complainant stated that she did not call the FBI and talk to Agent Waring or leave a message for him at any time between the two conversations she had with him on the 11th and 17th of

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January. (TR 65). She testified that when she called Agent Waring on the 17th and informed him she had been discharged he said "I know". She further stated that, upon being questioned how he knew, Agent Waring did not say how he knew. The Complainant testified that she then "assumed that there must be an FBI investigation going on, but he (Agent Waring) did not confirm that." (TR 13, June 13, 1991 hearing).

9. The Complainant stated that she arrived at work at 9:00 a.m. on January 17, 1991. Her supervisor, Ms. White, asked to speak to her in her office at which time Ms. White informed the Complainant that her employment with the Respondent had been terminated. (TR 17-19).

10. During this meeting, the Complainant maintains that she asked Ms. White if she was being fired because of her phone call to the FBI. (TR 20).

11. The Complainant testified that the reason given to her by Ms. White for her termination was that the Complainant would get bored with her job. (TR 20-21).

12. After the meeting, the Complainant went to Lisa Dempster's office where she met with Ms. Dempster and Mr. Collier. In response to the question of whether the Complainant was being fired because of her phone call to the FBI, the Complainant testified that she was told that the Respondent did not need a reason to fire her. (TR 22).

13. The Complainant stated that she observed co-workers walking around "red faced"<sup>7</sup> and felt that some were afraid to speak to her from Monday until the day she was discharged. Some of these co-workers were Margaret Aucoin, Pete Aucoin and Dave Pitts. (TR 47-48).

14. The Complainant testified that the first time she discussed her call to the FBI with anyone employed by the Respondent was when Ms. White informed the Complainant that she was terminated. (TR 25).

15. The Complainant testified that neither Ms. White nor, Ms. Aucoin had a conversation with her regarding either her performance or an alleged refusal to do assigned tasks. She further stated that she never complained about her job. (TR 25).

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16. The Complainant stated she had conversations with Ms. White and Ms. Aucoin regarding her belief that Ms. Shah was sabotaging her work by putting her filing in disarray (TR 28), breaking the microfiche copying machine in the library (TR 29), and tapping into the Complainant's computer line to create coding errors (TR 30).

17. The Complainant testified that, in December, her supervisors approached her regarding a position as a part-time analyst that would be posted on the bulletin board in January. They encouraged her to apply for the position which would have been a promotion for the Complainant. (TR 33-35).

18. The Complainant testified that she was confused as to which of the two advertised jobs she had been interviewed for and hired. (TR 41-45).<sup>8</sup>

19. The Complainant stated that, upon signing the paperwork when hired, she commented on the fact that the Respondent would get credit for her ideas. At this, she stated that Mr. Rogers told her to "keep your mouth shut or she'd be fired". She took this to mean that if she called a federal agency she would be fired. (TR 46- 47).

#### Respondent's Personnel

##### Robert Gordon Rogers

20. Mr. Rogers worked for the Respondent from 1982 until October 19, 1990. At the time he left the company, he was the Supervisor for the Information Products Group for the Respondent. This group consisted of Mr. Rogers and four other people - one full-time employee and three part-time employees (TR 86; TR 91).

21. Mr. Rogers interviewed and hired the Complainant for a position advertised in the want-ads<sup>9</sup>. (See CX-2). This position would be working in the Basic Products Group doing coding, filing, and technical assistance work to the analysts (TR 88). Mr. Rogers acknowledged that the Complainant may have initially believed that she was being interviewed for both positions advertised; however, by the time the Complainant left the interview she would have known which position was available to her (TR 95).

22. Mr. Rogers testified that he never told the Complainant that

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she would be fired if she "opened [her] mouth or spoke to someone outside the company". (TR 90).

23. Mr. Rogers never did a formal evaluation of the Complainant. At the time he left the Respondent's employ, the Complainant was still learning the job. However, Mr. Rogers did have concerns regarding the Complainant's ability to get along with her co-workers, an aspect of the job that he felt was essential as they were working in a relatively small group<sup>10</sup>. Nonetheless, he was not concerned with the Complainant's performance. (TR 90-93).

24. Mr. Rogers gave the Complainant a manual that described nuclear fuel cycles to help her understand definitions and terminologies useful to her position. In addition, he told the Complainant that if she worked well and learned the information in the manual she would have the opportunity to move up. (TR 97-98).

#### Margaret Aucoin

25. Ms. Aucoin is a full-time analyst in the fuel cycle analysis group for the Respondent. At the time the Complainant worked for the Respondent, Ms. Aucoin was a part-time analyst. She worked in the same group as the Complainant but was not her supervisor. When Ms. Aucoin initially began work for the Respondent, she had held the same position as the Complainant. As a result, Ms. Aucoin trained new aids and worked with them very closely in showing them how to use the computer programs. She also assigned the Complainant her work. (TR 101-102; TR 109; TR 125).

26. Ms. Aucoin stressed in her testimony that it was vital that the five members of this group work together and cooperate. (TR 103).

27. When the part-time aides code the information given to them by the analysts into the computer, they initial at the top right-hand corner of the paper. Thus, the analyst could determine who had coded it and who had made an error. (TR 103-104).

28. Ms. Aucoin testified that she had returned work to both the Complainant and Ms. Shah when there were errors in it. (TR 132).

29. Ms. Aucoin related that the Complainant did not work effectively within the small group. She illustrated this with

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various encounters: a group meeting to discuss the number of errors coming back in which the Complainant became defensive and uncooperative (TR 110-111); an instance

where the Complainant's filing was in disarray and the Complainant accused her co-worker of doing it (TR 112); telephone calls to Ms. Aucoin at home in which the Complainant attributed the errors in her work to "other people" (TR 113); an incident in which the Complainant was averse to listening to instructions regarding the filing in utility notebooks in the library (TR 114-115); hostility displayed by the Complainant when Ms. Aucoin attempted to explain what was wrong with her coding (TR 115). The end result of the Complainant's uncooperativeness was that Ms. Aucoin was distracted from her own work. (TR 114).

30. On the morning of January 16, 1990, Ms. Aucoin gave the Complainant the task of editing Lotus spreadsheets on a fabrication status report. This was a task that had a critical deadline and needed to be done promptly. Ms. Aucoin then noticed the Complainant speaking with one of the Respondent's programmers. When asked, the programmer said that they were discussing a computer program to do the task, rather than having to do it manually. At the end of the day, when the Complainant left work, the editing was not completed. At this time, Ms. Aucoin approached Ms. White regarding the Complainant's unsatisfactory work performance and informed her that the group would be "better off without her, even though it would make us even more short staffed". (TR 118-124).

31. Ms. Aucoin did not learn of the Complainant's call to the FBI until July of 1990. Her decision to recommend that the Complainant be terminated was not influenced in any way by the phone call to the FBI (TR 124).

Danny Michael Collier

32. Mr. Collier is the Vice President of the Resource Analysis Division of the Respondent. He has worked for the Respondent for twenty-one years. (TR 157).

33. Mr. Collier is the immediate supervisor for Ms. Vickie White. In order for Ms. White to terminate an employee, she would have to get Mr. Collier's approval. (TR 157).

34. On January 17, 1991 at approximately 7:30 a.m. Ms. White

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discussed her desire to terminate the Complainant with Mr. Collier. After hearing the reasons for the termination, Mr. Collier gave Ms. White the necessary approval. He acknowledged that he had had minimal contact with the Complainant and was relying on Ms. White's representations regarding the Complainant's job performance. (TR 157-158).

35. Mr. Collier had no knowledge of the Complainant's call to the FBI until an FBI agent came to his office on March 1, 1991. (TR 158-159).

36. Mr. Collier met with the Complainant and Ms. Dempster at 10:30 a.m. on January 17, 1991. After letting the Complainant vent her anger over being terminated, Mr. Collier reaffirmed that she was terminated and would not be rehired. At this point the Complainant started a list of ten to fifteen agencies that she was going to take action with. (TR 160-161).

37. Mr. Collier acknowledged that the Respondent has no policy that requires a written warning when an employee's performance is unsatisfactory. There were no written warnings given to the Complainant regarding unsatisfactory performance, nor was there any notation of verbal warnings in her personnel file. (TR 162).

#### Lisa Dempster

38. Ms. Dempster is the manager of administrative services for the Respondent, and she served in that capacity on January 17, 1990. She oversees all the administrative functions of the office, including the procedural paperwork matters dealing with an employee's termination. (TR 163-164).

39. On January 17, 1990, Ms. White came to Ms. Dempster and said that she had spoken with Mr. Collier, her supervisor, regarding the job performance of the Complainant. They had reached the decision that the Complainant needed to be terminated. Ms. Dempster instructed Ms. White to speak to the Complainant regarding the termination and submit a memo-to-the-file regarding the reasons for the termination. Following that the Complainant should come see her and she would take care of the necessary paperwork. (164-165).

40. The reason given for the Complainant's termination was listed as poor performance. (RX-5; TR 166).

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41. Ms. Dempster had no role in the decision to terminate the Complainant. (TR 167).

42. On January 17, 1990, she was not aware of the phone call, the Complainant made to the FBI; the first time she knew of this call was in March when an FBI agent visited the office. (TR 166-167).

#### Witnesses

##### Gerard P. Waring

43. Mr. Waring is a Special Agent with the FBI. He works out of the Gainesville office of the Atlanta division. (TR-68).



44. Agent Waring received a telephone call from the Complainant on January 11, 1991. He testified that during the course of the conversation, the Complainant informed him that an individual working at her place of employment, Ms. Varsha Shah, had been acting contrary to normal business procedures. He stated that the Complainant further explained that this individual's political beliefs made her behavior especially suspicious in light of the ongoing Middle East crisis called Desert Shield. The Complainant related that Ms. Shah was from the Middle East and that she engaged in telephone conversations in a foreign language when she was under the opinion that she was alone. The Complainant gave Mr. Waring her name and phone number prior to ending the conversation. (TR 68-69).

45. Following the telephone conversation with the Complainant, Agent Waring made a phone call to an FBI agent in the Atlanta office to notify him of this information and informed him that a memo, an inter-office informal letter, would soon follow. Agent Waring wrote, typed and mailed the memo on January 15, 1991. To ensure confidentiality, Agent Waring did not use the Complainant's name in the memo, thereby not informing the agent in Atlanta who had provided the information (TR 69-70; TR 78).

46. Agent Waring did not flag the memo in any way as being of a priority situation. In his testimony, he stressed that the memo would have been mailed as it was "not a matter of utmost urgency" and was just "one of many phone calls that we had received in that period of time".<sup>11</sup> Following these actions, the responsibility for the case was transferred to another agent. (TR 72-73; TR 80).

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47. After the first phone call of January 11, 1991, Agent Waring testified that he received a "number of phone calls" from the Complainant. During one of these phone calls on January 17, 1991, the Complainant notified Agent Waring that she had been fired from her employment with the Respondent. This came as no surprise. Agent Waring testified that he had actually been forewarned of her termination since the Complainant had already called and left a message with one of the other employees in his office that she had been fired. Agent Waring had not been informed by the Respondent of the Complainant's firing. (TR 71; TR 75-76).

48. The Complainant requested that Agent Waring protect her confidentiality, which he did. He did not discuss this case with any other agents in his office. Agent Waring did not contact the Respondent. (TR 74; TR 77-78; TR 80; TR 83).

49. The Complainant told Agent Waring that she had told employee's of the Respondent, upon being terminated, that she had contacted the FBI. (TR 77).

Thomas Tarley<sup>12</sup>

50. Agent Tarley is a special agent with the FBI. He works out of the Atlanta, Georgia office. (RX 7:1).

51. Agent Tarley was assigned the Complainant's case and opened the case file on January 28, 1991. (RX 7:1)

52. The first contact Agent Tarley had with anyone employed by the Respondent was on March 1, 1991 when he visited the Respondent's offices in order to question officials of that company regarding the Complainant's report. (RX 7:1).

53. When Agent Tarley conducted his investigation, he was not aware that the person who had initiated the complaint was the complainant. (RX 7:2).

54. Agent Tarley knows of no other contact between the FBI and the Respondent regarding this matter prior to his visit to the Respondent's offices on March 1, 1991. (RX 7:2).

David B. Hancock<sup>13</sup>

55. Mr. Hancock is the Complainant's husband. (CX 3:1).

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56. In his affidavit, Mr. Hancock avers that on January 16, 1991, at 5:00 p.m., Mr. Hancock telephoned the Respondent's place of business to locate his wife. A person, the identity of which Mr. Hancock is unsure of, answered the telephone. After inquiring whether his wife was there, Mr. Hancock asked the party on the telephone whether the FBI had conducted an investigation concerning Varsha Shah (the co-employee the Complainant called the FBI about). When asked to elaborate, Mr. Hancock explained that his wife, the Complainant, had reported Ms. Shah to the FBI because she thought she might be a spy. (CX 3:1).

57. The documentation for this telephone call is on Mr. Hancock's telephone bill as this was a long distance call. (CX 3:3).

#### Discussion of the Law

Section 210(a) of the Energy Reorganization Act of 1974 provides that no employer subject to the Act:

may discharge any employee or otherwise discriminate against any employee ... because the employee commenced, caused to be commenced, or is about to commence or cause to be commenced a proceeding under this Act or the Atomic Energy Act of 1954, testified or is about to testify in any such proceeding, or assisted or participated or is about to assist or participate in any manner in such a

proceeding ... or any other action to carry out the purposes of this Act or the Atomic Energy Act of 1954.

42 U.S.C. § 5851(a). An employee may seek enforcement of Section 210 (a) pursuant to the procedure outlined under Section 210 (b). 42 U.S.C. § 5851(b).

In order to establish a violation of § 210 of the Act, an employee must establish: (1) that the party charged with discrimination is an employer subject to the Energy Reorganization Act; (2) that the complaining employee was discharged or otherwise discriminated against with respect to her employment; and (3) that the alleged discrimination arose because the employee engaged in protected activity. *See, e.g., DeFord v. Secretary of Labor*, 700 F.2d 281, 286 (6th Cir. 1983). A prima facie case of retaliatory discharge is established when the complainant shows: (1) engagement in protected activity; (2) defendant's awareness of plaintiff's engagement in protected activity; (3) plaintiff's subsequent discharge; and (4) that the discharge followed the

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protected activity so closely in time as to justify an inference of retaliatory motive<sup>14</sup>. *Russell v. Jones*, 886 F.2d 149 (8th Cir. 1989). *See also Keys v. Lutheran Family and Children's Services of Missouri*, 668 F.2d 356, 358 (8th Cir. 1981); *Womack v. Munson*, 619 F.2d 1292, 1296 & n. 6 (8th Cir. 1980) (same), *cert. denied*, 450 U.S. 979, 101 S.Ct. 1513, 67 L.Ed.2d 814 (1981); *Accord Davis v. State University of New York*, 802 F.2d 638, 642 (2d Cir. 1986) *Mitchell v. Baldrige*, 759 F.2d 80, 86 (D.C. Cir. 1985).

The complainant bears the burden of proving that her engaging in protected conduct was "a motivating factor" in the employer's decision to terminate her employment. Once proven, the burden then shifts to the employer to demonstrate that the same employment action would have taken place even in the absence of the protected conduct<sup>15</sup>. *See, e.g., Consolidated Edison Co. of New York, Inc. v. Donovan*, 673 F.2d 61, 62 (2nd Cir. 1982). However, where substantial evidence supports a finding that the discharge complained of would have occurred despite the alleged protected activity, "adjusting the order of proof and analyzing that activity under Section 210 became 'academic exercises of little or no value,'" for the complaining party "may prevail only if [s]he would not have been discharged *but for* [her] participation in the statutorily protected activity." *Dunham v. Brock*, 794 F.2d 1037, 1040 (5th Cir. 1986) (emphasis in original) (quoting *DeFord*, 700 F.2d at 285).

In the case at hand, the parties have stipulated that the Respondent was subject to the Energy Reorganization Act of 1974. (Stipulation No. 1). In addition, the parties have stipulated that the Complainant was discharged from her employment with the Respondent on January 17, 1991. (Stipulation No. 2). Furthermore, the Complainant's telephone call to the FBI to report the suspicious telephone calls made by Ms. Shah constitutes protected activity under § 5851 of the Energy Reorganization Act. Thus, the

remaining element the Complainant must prove is that she was discharged in retaliation for her protected activity.

In establishing a prima facie case of retaliatory discharge, the Complainant has shown that she engaged in protected activity; that she was discharged and that the discharge followed the protected activity closely in time. The Complainant must still prove that the Respondent was aware of the Complainant's engagement

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in the protected activity.

The Complainant argues that by combining certain pieces of evidence prior knowledge of the complaint to the FBI may be imputed to the Respondent. (See Complainant's Brief at 8). The FBI's knowledge of the complaint since January 11, 1990 coupled with Agent Waring's prior knowledge of the firing has led the Complainant to jump to the conclusion that the Respondent and the FBI had been in contact prior to the termination. Additionally, the Complainant points out that Agent Tarley stated with equivocation that no one from the FBI contacted the Respondent. The Complainant professes that the evidence from the Respondent's agents supporting lack of knowledge is self-serving and should be carefully weighed. Furthermore, the Complainant alleges that the Respondent had knowledge of the Complainant's telephone call via a telephone call Mr. Hancock placed to the Respondent's place of business on January 16, 1991 in which he informed an unknown and unnamed person that his wife, the Complainant, had placed a call to the FBI regarding the activities of Ms. Shah.

The facts simply do not support the Complainant's allegation. The Complainant testified that she never informed anyone associated with the Respondent of her telephone call to the FBI until after she was notified by Ms. White that she was being terminated for poor performance and a failure to follow instructions. (Finding 14). None of the other employees of the Respondent who had contact with the Complainant during or immediately after she was informed of the decision to terminate her recall the Complainant mentioning the telephone call to the FBI. (Findings 31, 35, 42). The evidence is uncontradicted that the Complainant herself did not inform any employees of the Respondent of the telephone call prior to the time that she was informed she was terminated.

In addition, the evidence also confirms that neither of the agents from the FBI who handled the Complainant's complaint contacted the Respondent prior to her discharge. Agent Waring testified that he respected the Complainant's request to keep her report confidential and that he never informed the Respondent of the Complainant's telephone call and, in fact, never informed Agent Tarley of the Complainant's name in their telephone conversation nor in the inter-agency memo he sent afterwards. (Findings 45, 48). Additionally, he did not disclose the Complainant's name to any other agent in either the Atlanta or the Gainesville offices. (Finding 48).

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Agent Waring did not draft and send the memo until January 15, 1991. The memo was sent through an inter-office system and was not flagged as a priority item. (Findings 45, 46). Agent Tarley received and opened the file on the Complainant's case on January 28, 1991. (Finding 51). Moreover, Agent Tarley did not know the Complainant's name when he conducted the investigation as Agent Waring had not provided that information. (Finding 53).

Both FBI agents who handled the Complainant's complaint have testified that neither of them contacted the Respondent prior to March 1, 1991. (Findings 47, 53). This is corroborated by the testimony of Mr. Collier who stated that the first contact between the FBI and the Respondent was on March 1, 1991 when Agent Tarley visited the Respondent's offices. (Finding 35).

The Complainant has introduced the affidavit of her husband to prove that the Respondent had knowledge of the Complainant's telephone call prior to her being terminated<sup>16</sup>. Mr. Hancock testified that he made a telephone call to the Respondent on January 16, 1991 to inquire as to the whereabouts of his wife. (Finding at 56). He then asked the unknown and unnamed person who answered the phone if the FBI had conducted an investigation into his wife's report regarding Ms. Shah. After being asked to elaborate, Mr. Hancock reported that his wife had phoned the FBI because she thought Ms. Shah might be a spy. (Finding at 56). The telephone bill attached shows that a one minute telephone call was made to the Respondent's phone number at 5:07 p.m. and a two minute telephone call was made to the Respondent's phone number at 5:08 p.m. (Finding at 57).

This affidavit is not given any weight. First, it is inconceivable that the Complainant and her husband did not discuss this telephone call prior to December 2, 1991 when the Complainant had been actively pursuing litigation for eleven months. In addition, it is inconceivable that Mr. Hancock would have within a span of two minutes so cavalierly discussed with an unknown person a complaint made in confidence to the FBI by his wife. Lastly, even if Mr. Hancock's affidavit was accorded any weight, the Complainant has failed to demonstrate that the Respondent's agents who made the decision to terminate the Complainant had knowledge of the phone call. I will not impute knowledge to these agents from a phone call to an unknown and unnamed person. The Complainant has simply failed to establish through credible evidence a prima facie

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case of retaliatory discrimination under § 210 of the Energy Reorganization Act.

Testimony from Ms. White, Ms. Aucoin, Mr. Collier and Ms. Dempster all support lack of knowledge on the Respondent's part prior to the Complainant being discharged. The

testimony of the four employees, the two FBI agents and the Complainant herself verifies that the Respondent's agents instrumental to the termination decision had no knowledge of the Complainant's phone call to the FBI at the time they made their decision. Assuming, *arguendo*, that the Complainant had established a *prima facie* case, the evidence submitted by the Respondent would certainly be sufficient to rebut the presumption.

The Respondent has also clearly set forth reasons for the Complainant's termination and has shown that the action taken in discharging the Complainant was based upon legitimate non-discriminatory reasons. Several witnesses testified that the Complainant's attitude was questionable. Mr. Rogers expressed concern over the Complainant's ability to work with the other members of the group (Finding 23) and Ms. Aucoin related that the Complainant did not work effectively within the small group (Finding 29). They testified that the Complainant had caused general morale problems and had demonstrated an inability to cooperate. Testimony also revealed that the Complainant had been dismissed because of poor job performance and this is supported by both the memo-to-the-file and the Separation notice.

Thus, the Respondent has confirmed that it would have reached the same direction regarding dismissal even in the absence of the protected activity.

Accordingly, as the Complainant has failed to show that she was discharged in retaliation for her protected activity, it is recommended that the complaint be DENIED.

DANIEL A. SARNO, JR.  
Administrative Law Judge

DAS/kdb/ccb

#### **[ENDNOTES]**

<sup>1</sup> The following abbreviations will be used as citations to the record:

JX - Joint Exhibits  
CX - Complainant's Exhibits  
RX - Respondent's Exhibits  
TR - Transcript of the October 1, 1991 hearing  
TR , June 13, 1991 - Transcript of the June 13, 1991 hearing

<sup>2</sup> These stipulations are from the hearing held on June 13, 1991.

<sup>3</sup> Hereinafter any reference to the transcript (TR) will refer to the transcript of the hearing on October 1, 1991 unless reference is made to the June 13, 1991 hearing.

<sup>4</sup> The Complainant believed that Ms. Shah was acting adverse to the interests of the United States in these telephone calls. She based this conclusion on her belief that Ms.

Shah was a foreign national, heated political discussions between the Complainant and Ms. Shah over the current world situation and the nature of the work performed by the Respondent. (TR 53-58).

<sup>5</sup> The transcript reveals an ambiguity in the spelling of Ms. Shah's name - Saah or Shah (See TR 20). Herein her name will be spelled Shah.

<sup>6</sup> Whether or not the Complainant had a valid complaint is irrelevant to this proceeding and will not be addressed.

<sup>7</sup> By "red faced" the Complainant meant that the co-workers had an embarrassed look on their faces. (TR 48).

<sup>8</sup> Both the Complainant's application and a letter addressed to Mr. Rogers stated she was interested in the technical aide position. TR 43-44; RX 1; RX 2).

<sup>9</sup> The position Mr. Rogers interviewed and hired the Complainant for was the first position listed of the two advertised together. (TR 88).

<sup>10</sup> Mr. Rogers based his conclusion that the Complainant was having problems getting along with co-workers on a conversation with the receptionist in which the Complainant questioned how the receptionist knew her name and the Complainant's reaction when Mr. Rogers decided to resign. (TR 92-93).

<sup>11</sup> Due to the American military build-up in the Middle-East under Desert Shield, the FBI was receiving a lot of telephone calls regarding suspicious behavior related to the world situation. Agent Waring stated that the Complainant's call was similar to the other calls. As such, Agent Waring did not flag the Complainant's complaint as a priority situation. (TR 82-83).

<sup>12</sup> The Affidavit of Thomas Tarley was submitted into evidence by Order dated November 21, 1991. It is labelled RX 7.

<sup>13</sup> The Affidavit of David Hancock was submitted into evidence by Order dated December 13, 1991. It is labelled CX 3.

<sup>14</sup> A showing that the complainant's discharge followed the protected activity closely in time does not, standing alone, establish the plaintiff's *prima facie* case under § 210. See *Couty v. Dole*, 886 F.2d 147, 148 (8th Cir. 1989).

<sup>15</sup> Under [§ 210] an employer may discharge an employee who has engaged in protected conduct as long as the employer's decision ... is not motivated by retaliatory animus and the employer has reasonable grounds for the discharge. *Lockert v. U.S. Dept. of Labor*, 867 F.2d 513, 519 (9th Cir. 1989).

<sup>16</sup> Admitted as evidence by order of Reconsideration dated December 13, 1991.